IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs August 1, 2023

JASON WHITE v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 17-01568, 16-02794 J. Robert Carter, Jr., Judge

No. W2022-01437-CCA-R3-PC

Petitioner, Jason White, appeals from the Shelby County Criminal Court's denial of his petition for post-conviction relief. On appeal, Petitioner argues: (1) the post-conviction court abused its discretion by failing to recuse itself; (2) the post-conviction court abused its discretion by denying Petitioner a full and fair post-conviction procedure; (3) trial counsel provided ineffective assistance in numerous areas; and (4) he is entitled to relief based on cumulative error. After review, we affirm the judgment of the post-conviction court, but remand the case to the post-conviction court for the entry of amended judgments that properly reflect the offenses for which Petitioner was indicted and convicted.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed; Case Remanded

MATTHEW J. WILSON, J., delivered the opinion of the court, in which TIMOTHY L. EASTER and JOHN W. CAMPBELL, SR., JJ., joined.

Jason White, Santa Rosa, New Mexico, Pro Se (at post-conviction hearing and on appeal); Shae Atkinson, Memphis, Tennessee, advisory counsel (at post-conviction hearing).

Jonathan Skrmetti, Attorney General and Reporter; Lacy E. Wilber, Senior Assistant Attorney General; Steven J. Mulroy, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Pretrial Proceedings

The Shelby County Grand Jury indicted Petitioner on April 21, 2016[1] on one count of conspiracy to possess methamphetamine with the intent to sell within a drug-free zone and one count of conspiracy to possess methamphetamine with the intent to deliver within a drug-free zone. On May 16, 2016, an Assistant District Attorney General ("Prosecutor[2]") addressed the trial court about transferring Petitioner from Tennessee Department of Correction ("TDOC") custody, where he was being held, to the Shelby County Jail:

> PROSECUTOR: On a matter not on the Court's calendar. It is scheduled on June the 2nd is a [Jason] White and Kristina Cole. [Jason] White is in a unique situation in that he is an inmate at the Riverbend Maximum Security Prison in Nashville. And . . . I prepared an order to have him transported if the Clerk's Office would be so kind to transmit that fugitive so that they will go get him.
>
> TRIAL COURT: I will sign the order and hopefully he'll be here for his arraignment day.
>
> PROSECUTOR: Okay. I think the Court will enjoy the facts on this case. I've never seen anything quite like it.
>
> TRIAL COURT: Conspiracy and in a drug free school zone.
>
> PROSECUTOR: Allegedly Mr. White ordered half a kilo of methamphetamine from another inmate in California who arranged to have it shipped FedEx to his fianc[é]'s house in Bartlett, and of course, it was unaccepted.
>
> TRIAL COURT: Is the shipper not involved in this?
>
> PROSECUTOR: We do not know who the shipper is.
>
> TRIAL COURT: Amazon.com I guess. Everything else—

[1] The Grand Jury returned a superseding indictment on March 30, 2017, which added an additional co-defendant. The charges against Petitioner were the same in both indictments.

[2] For clarity, we will refer to this specific Assistant District Attorney General as "Prosecutor" and the post-conviction prosecutor as "the State."

PROSECUTOR: I think it'd be fun to find—

TRIAL COURT: —everything else is available. I guess they could always do the classic surprise—you know—

PROSECUTOR: Well, it would have been—it might have been encrypted had she not been getting cellphone calls from Mr. White.

TRIAL COURT: Updates, huh?

PROSECUTOR: The whole time and while police were there.

TRIAL COURT: What's he doing time for?

PROSECUTOR: Especially [aggravated] kidnapping, especially [aggravated] robbery. He's apparently a ranking member—

TRIAL COURT: Got a quite—got a quite of a resume.

PROSECUTOR: He's a ranking member of the Vice Lords in prison.

TRIAL COURT: Well—

PROSECUTOR: So he's—he's very comfortable. Have a good afternoon, Judge.

Petitioner was not present at this hearing and was not represented by counsel at that time. Petitioner did not raise any issues with the transfer hearing during the trial proceedings or on direct appeal. Petitioner first challenged this exchange in his May 15, 2020 motion to recuse the post-conviction court.

Trial

Petitioner proceeded to a jury trial in Shelby County, in which two co-defendants were also tried. On direct appeal, this court summarized the evidence produced at Petitioner's trial:

> At trial, Detective Mark Gaia testified that he worked for the Bartlett Police Department ("BPD"). In February 2016, he worked in the narcotics unit of the BPD. Around February 2, 2016, Detective Gaia received a phone

call from a detective in Visalia, California, regarding a package that contained methamphetamine that had been shipped from California to an address in Bartlett, Tennessee. The package was addressed to "Bailey Green" and listed 2552 Linwood as the address.[3] After the BPD intercepted the package, officers weighed the package and tested the contents. Detective Gaia testified that the package contained a bag of children's clothing and one pound of methamphetamine. He explained that a pound of methamphetamine would be worth $12,000 to $15,000.

Detective Gaia obtained a search warrant, and Detective Jeffrey Swindol conducted a controlled delivery of the package to Co-defendant Cole's residence at 2552 Jenwood. After Co-defendant Cole accepted the package, Detective Gaia knocked on the door of her residence, and Co-defendant Cole let him inside. Once inside, Detective Gaia observed the package inside the house. Co-defendant Cole gave him permission to search the residence. During the search, Detective Robert Christian found a photograph on the nightstand in Co-defendant Cole's bedroom that depicted a man wearing a prison uniform. When Detective Gaia asked Co-defendant Cole about the photograph, she stated that it was her ex-boyfriend, "Timothy Smith," whose birthday was March 11. Detective Gaia confirmed that the individual in the photograph was Petitioner based on "numerous handwritten letters that were addressed to [Co-defendant] Cole from [Petitioner] at the Riverbend Maximum Institution near Nashville."

Detective Gaia collected three cell phones from Co-defendant Cole: a Verizon HTC phone, a Samsung phone, and an LG phone. He also found a laptop computer. He observed that Co-defendant Cole had recently tracked a package on the Fed-Ex website from the search history of the computer. The tracking number of the package that Co-defendant Cole tracked electronically matched the number of the package that the BPD intercepted and delivered to Co-defendant Cole's residence. Co-defendant Cole denied knowing anyone named Bailey or knowing the contents of the package. Detective Gaia identified evidence of several forms of communication between Co-defendant Cole and [Petitioner], including a handwritten letter from [Petitioner] to Co-defendant Cole. Detective Gaia also found a receipt for a money order to [Petitioner], which listed his inmate booking number, and a receipt for a purchase by Co-defendant Cole to [Petitioner] through Union Supply Direct, Inmate Direct Sales. Detective Gaia observed several PayPal and MoneyPak cards in the residence.

[3] Detective Gaia determined that there was not a valid address of 2552 Linwood in Shelby County. He learned that the correct address was 2552 Jenwood. (original footnote at 2019 WL 549652, at *1 n.1).

While Detective Gaia was discussing the contents of the computer with Co-defendant Cole, the LG cell phone continuously rang. The caller was listed in Co-defendant Cole's phone as "Line Boo Other[.]" When Detective Gaia picked up the phone and hit the answer button, Co-defendant Cole stated that she wanted an attorney. After Detective Gaia placed Co-defendant Cole under arrest, Dustin White[4] pulled into the driveway of Co-defendant Cole's residence. As he spoke with Mr. White, Detective Gaia noticed that the same phone number that called Co-defendant Cole's phone was also continuously calling Mr. White's phone. Detective Gaia noted that Mr. White was [Petitioner's] brother and that the phone number that called Mr. White's phone was listed as "J." Detective Gaia identified a Google Earth picture that showed Co-defendant Cole's residence was approximately 200.62 feet away from Raleigh-Bartlett Meadows Elementary School.[5]

On Co-defendant Cole's HTC cell phone, Detective Gaia observed that Co-defendant Cole sent a photograph of herself to (731) 693-6346. Co-defendant Cole also received a photograph of [Petitioner] from (901) 573-4218. The photograph message was signed "Da Junk Yard." Detective Gaia noted that the photograph of [Petitioner] appeared to have been taken in a jail cell. Detective Gaia also examined the contact list and text messages on Co-defendant Cole's HTC cell phone. He observed that the contact number for "Jason White" and "Boo" were the same—(731) 217-2745. He also noted that the contact number for "New Boobear" was (731) 694-7388.

When Detective Gaia examined Co-defendant Cole's Samsung cell phone, he observed text message exchanges with (731) 694-9127. This phone number used a signature of "COUNTRY CRAZY[.]" Co-defendant Cole texted the following message to this number: "Hey baby. This is my other number. Lock me in. Love I baby ... [.]" Throughout Co-defendant Cole's numerous text message exchanges with this phone number, she frequently referred to the recipient as "Boo Bear." Co-defendant Cole also referred to the recipient of messages to (731) 499-3517 as "BooBear." This phone number used "L.L.K.N. J.Y.D." as its signature, and Co-defendant Cole saved this number in her contact list as "New BooBear." On January 28, 2016, Co-defendant Cole sent the following message to "New BooBear":

[4] Detective Gaia refers to this individual as "Dustin Van White." However, this individual is referred to as "Dustin White" in the remainder of the transcripts. For purposes of clarity, we will refer to him as Mr. White. (original footnote at *id.*, *2 n.2).

[5] Sergeant Terrence Riley also testified that Co-defendant Cole's residence at 2552 Jenwood was located within 1,000 feet of Raleigh Bartlett Meadows Elementary School. (original footnote at *id.*, *2 n.3).

"$125 - 890 884 6154[.]" Detective Gaia stated that Co-defendant Cole was informing [Petitioner] that she loaded $125 into account number 890-884-6154. Detective Gaia also discovered contacts in Co-defendant Cole's Samsung cell phone named "BooBear Other Line[,]" connected to (731) 394-1929 and "BooBear Second[,]" connected to (615) 917-3749.

Detective Gaia also examined Co-defendant Cole's LG cell phone and found a photograph of [Petitioner] that was sent from (731) 693-2611. The sender of the photograph used the following signature: "Da Junk Yard." Co-defendant Cole sent messages to this phone number, and referred to the recipient as "BooBear." Co-defendant Cole also exchanged text messages with (731) 443-6670 and, again, referred to the recipient of her messages as "BooBear." In May 2015, Co-defendant Cole texted (615) 564-0303 on her LG cell phone and referred to the recipient as "BooBear." The recipient used the following signatures: "$SAME N***A SINCE DAY1$" or "$Loyalty Bring Royalty$[.]" In July 2015, Co-defendant Cole began exchanging text messages with (731) 694-9127, and she referred to the recipient as "BooBear." The recipient used the signature of "COUNTRY CRAZY[.]" Co-defendant Cole also exchanged text messages with contacts identified as "New BooBear" connected with (731) 499-3517 and "Line Boo Other" connected with (615) 917-3749. Co-defendant Cole sent the following text messages to the "Line Boo Other" contact on January 27, 2016: "Sender: Kristina Cole, Memphis TN Control # 864-588-3690, $ 100" and "$ 75 - 756 663 9348 $ 30 - 748 829 1871[.]" On February 3, 2016, the day of the controlled delivery, Co-defendant Cole sent the following text messages to "Line Boo Other": "Package arrived[,]" "They put the wrong street name. Lucky they knew what it was suppose [sic] to be[,]" and "What do you want me to do with it?"[6]

Detective Gaia testified that he listened to the recordings of Co-defendant Cole's outgoing calls while she was incarcerated.[7] Detective Gaia identified nineteen phone calls where [Petitioner] was part of the conversation with Co-defendant Cole. In the tenth phone call on the recording, Co-defendant Cole called a phone number and her older son,

[6] On cross-examination, Detective Gaia stated that he sent the final text message to "Line Boo Other" on Co-defendant Cole's LG phone. He explained that he sent the text message on Co-defendant Cole's phone because he was attempting to arrange for the recipient of the package to pick it up. (original footnote at *id.*, *3 n.4).

[7] Detective Michael Harber of the Shelby County Sheriff's Office explained that, when an inmate uses a phone while incarcerated, the inmate must use a personal identification number before placing a call. Detective Harber identified a recording of phone calls that Co-defendant Cole made while she was incarcerated. (original footnote at *id.*, *3 n.5).

Burnest, answered the phone. Burnest connected a third party to the call; Detective Gaia identified this caller as Kimberly White, [Petitioner's] mother. Ms. White then connected a caller that Detective Gaia identified as [Petitioner] to the call with Co-defendant Cole by speaker phone. During the call, [Petitioner] told Co-defendant Cole that "[w]e got some money[,]" "we are going to get a lawyer[,]" and "we are going to get you out." [Petitioner] also states that "Tez did this s**t" and that "Tez lied to [Co-defendant Cole]" and told Co-defendant Cole that the package contained jewelry. [Petitioner] told Co-defendant Cole that Co-defendant Mullins was "filling out an affidavit right now" to give to Co-defendant Cole's attorney. [Petitioner] also stated that Co-defendant Mullins told Co-defendant Cole to check the "numbers" and that Co-defendant Mullins was going to "admit to it." At the end of the phone call, [Petitioner] told Co-defendant Cole to "[c]all Momma's phone right now, baby." Co-defendant Cole then called a phone number that Detective Gaia identified as Ms. White's phone. During this phone call and other phone calls, Ms. White connected [Petitioner] to the call via speaker phone. During the thirteenth recorded call, [Petitioner] told Co-defendant Cole, "They can't hold you accountable for what you don't know." During several of the calls, Co-defendant Cole referred to [Petitioner] as "Timothy." Additionally, in several calls, [Petitioner] and Co-defendant Cole discussed accessing PayPal accounts.

On cross-examination, Detective Gaia clarified that the managers at the California Fed-Ex facility opened the package because they suspected that it contained contraband. A detective in California then contacted the BPD regarding the package. Detective Gaia agreed that the text message exchanges between Co-defendant Cole and [Petitioner] were not illegal on their face. He also agreed that transferring money into a PayPal account or using a prepaid credit/debit card was not illegal. He stated that [Petitioner] used at least ten different phone numbers to communicate with Co-defendant Cole. However, Detective Gaia could not confirm that [Petitioner] had exclusive control of the phone numbers.

Special Agent Peter Hall testified that he worked for the Tennessee Bureau of Investigation as a forensic chemist. After the trial court declared Special Agent Hall to be an expert, he stated that the package delivered to 2552 Jenwood contained 441.17 grams of methamphetamine, a Schedule II controlled substance.

Detective Christian testified that he worked in the Investigative Services Narcotics Unit of the BPD. On February 3, 2016, Detective Christian assisted Detective Gaia with executing the search warrant on the residence at 2552 Jerwood. Detective Christian found the photograph of

[Petitioner] on Co-defendant Cole's nightstand. On February 22, 2017, Detective Christian interviewed Co-defendant Mullins. He stated that he did not believe that Co-defendant Mullins was completely truthful during the interview because Co-defendant Mullins said "honestly" and "I swear to God" frequently.

During his interview with Detective Christian, Co-defendant Mullins stated that, at the end of January 2016, he was incarcerated at the "Northeast penitentiary" when another inmate, "Angel," approached him and offered to pay him $600 if Co-defendant Mullins provided him with a mailing address in Memphis. Angel informed Co-defendant Mullins that the package would contain "ice," or crystal methamphetamine. Co-defendant Mullins contacted Co-defendant Cole and asked if he could send a package with a gift of jewelry for his mother to her address. Co-defendant Cole agreed, and Co-defendant Mullins gave her address to Angel. Angel then gave Co-defendant Mullins $ 300 through PayPal and promised to give him an additional $300 after the package was delivered. Angel later provided Co-defendant Mullins with a tracking number for the package, which Co-defendant Mullins gave to Co-defendant Cole. A few days later, Co-defendant Mullins received a text message from Co-defendant Cole informing him that the package arrived, despite the fact that the package listed the wrong address. Co-defendant Mullins informed Angel that the package arrived and attempted to call Co-defendant Cole. After he was unable to reach Co-defendant Cole, Co-defendant Mullins called Co-defendant Cole's "husband," [Petitioner].

Co-defendant Mullins asserted that Co-defendant Cole was unaware that the package contained methamphetamine. Co-defendant Mullins explained that he met Co-defendant Cole through [Petitioner]. Co-defendant Mullins met [Petitioner] while they were incarcerated in Morgan County in 2012. He also stated that Co-defendant Cole called him "Boo Bear." He said that he did not have a romantic relationship with Co-defendant Cole.

Investigator Andrew Brown testified that he worked for the Tennessee Department of Correction as an investigator in the Office of Investigation and Complaints. Investigator Brown met [Petitioner] while [Petitioner] was incarcerated at the Riverbend Maximum Security Institution. On February 3, 2016, Investigator Brown received a phone call from Detective Gaia about [Petitioner]. Based on his conversation with Detective Gaia, Investigator Brown and some other employees went to [Petitioner's] jail cell and observed [Petitioner] flushing a cell phone down his toilet. Investigator Brown confiscated a cell phone charger but was unable to retrieve the cell phone. Investigator Brown stated that one of the signatures that [Petitioner] used to communicate with Co-defendant Cole, L.L.K.N. J.Y.D., meant "Long Live

> King Neal Junk Yard Dog[.]" "Long Live King Neal" referred to the founder of the Traveling Vice Lords, Neal Wallace. "Junk Yard Dog" referred to a faction of the Traveling Vice Lords that was organized by Charles Thompson, also known as "Country." Investigator Brown testified that there was no legitimate reason for an inmate to need a PayPal or Green Dot account. He explained that inmates could receive financial help from friends and family members through JPay, but inmates did not need a non-authorized cell phone to receive funds through JPay and non-inmates could send money to an inmate through JPay with a computer or smart phone. In Investigator Brown's experience, inmates used PayPal or Green Dot accounts to purchase contraband items such as tobacco products, narcotics, cell phones, or homemade weapons. He acknowledged that he did not know what the specific transactions noted on Co-defendant Cole's phone were for.
>
> Co-defendant Cole, [Petitioner], and Co-defendant Mullins decided to not testify.

White, 2019 WL 549652, at *1-4.

Petitioner was convicted of one count of conspiracy to possess methamphetamine with the intent to sell within a drug-free zone and one count of conspiracy to possess methamphetamine with the intent to deliver within a drug-free zone. The trial court sentenced Petitioner to a term of sixty years as a career offender. This court affirmed Petitioner's convictions on appeal. *State v. White*, No. W2018-00329-CCA-R3-CD, 2019 WL 549652 (Tenn. Crim. App. Feb. 11, 2019), *reh'g denied* (Tenn. Crim. App. Mar. 8, 2019).[8] The Tennessee Supreme Court denied Petitioner's application for permission to appeal on July 19, 2019.

Post-Conviction Proceedings

On April 21, 2020, Petitioner filed a timely pro se petition for post-conviction relief. On May 15, 2020, Petitioner filed a motion for the post-conviction court to recuse itself. The judge presiding over the post-conviction case had also presided over Petitioner's trial.

In May 2020, Petitioner filed his first motion for the post-conviction court to recuse itself. In the motion, Petitioner argued a pretrial ex parte discussion between the trial court and Prosecutor, who exposed the trial court to "the circumstances of the case" and Petitioner's "prior criminal history and gang affiliation." Petitioner argued this knowledge,

[8] Co-defendants Kristina Cole and Montez Mullins were also convicted of various offenses after trial. In their appeal, this court affirmed the co-defendants' convictions. *See State v. Cole and Mullins*, No. W2017-01980-CCA-R3-CD, 2018 WL 5810011 (Tenn. Crim. App. Nov. 5, 2018).

together with "the accumulation of [the trial judge's] actions violated [Petitioner's] constitutional rights to have his case heard by an impartial decision maker." Petitioner also argued the trial court was prejudiced against Petitioner by refusing to discharge his trial attorney (Counsel) despite an "obvious" conflict of interest. On August 28, 2020, the post-conviction court filed an order denying Petitioner's first motion to recuse the post-conviction court. In its order, the post-conviction court concluded the adverse rulings did "not create a basis for [the post-conviction] court to recuse itself. All of the rulings were able to be (and generally were) the subject of Petitioner's direct appeal." As to the trial court's and Prosecutor's discussing Petitioner's transfer from Tennessee Department of Correction ("TDOC") custody, the post-conviction court stated, "This type of communication is specifically allowed for purposes of 'scheduling, administrative, or emergency purposes' and ultimately concerned allegations that were to be (and were) determined by the trier of fact which was a jury in this case."

Petitioner was transferred to a prison in New Mexico before filing his post-conviction petition. He moved to represent himself in the post-conviction proceedings, and he also sought to be transferred to Tennessee to attend the hearings. The post-conviction court permitted Petitioner to waive his right to counsel, but appointed advisory, or "elbow" counsel to assist Petitioner due to Petitioner's out-of-state incarceration. On June 9, 2021, Petitioner filed in this court an application for extraordinary appeal per Rule 10 of the Tennessee Rules of Appellate Procedure. Petitioner asserted "the trial court ha[d] violated his right to proceed pro se and right to due process by refusing to sign an order transporting [him] back to Shelby County to appear at various status dates and motion hearings, thereby forcing [advisory] counsel to 'actively participate' and advocate on [Petitioner's] behalf." *White v. State*, No. W2021-00638-CCA-R10-PC, slip op. at 1 (Tenn. Crim. App. June 28, 2021) (order denying permission to appeal under Rule 10).

On June 28, 2021, this court filed an order denying Petitioner's Rule 10 application for permission to appeal. In the order, this court noted Petitioner "ha[d] not attached any order from the trial court denying his request to be transported to Shelby County . . . . Thus, there [was] nothing for this Court to review under the terms of Rule 10." *Id.*, slip op. at 1-2. The order also stated, "This Court generally does not interfere with the trial court's management of its docket, and it does not appear that the trial court has held any substantive hearings that would ultimately affect the merits of [Petitioner's] post-conviction petition." *Id.*, slip op. at 2. We similarly observed that there was no order in the record denying Petitioner access to transcripts, but we noted that "an indigent post-conviction petitioner is entitled to transcripts at the State's expense." *Id.* (citations omitted). As for Petitioner's being housed in New Mexico, we observed that in light of the then-ongoing COVID-19 pandemic, "an order requiring [Petitioner's] physical presence in Shelby County may not have been necessary or prudent." *Id.* We noted alternative means of "attendance" available to Petitioner during the pandemic, such as telephone and video conferencing. *Id.* Finally, Petitioner used the Rule 10 application to attack the post-conviction court's denial of the first motion to recuse; as Petitioner acknowledged, such an appeal would have been

untimely, and we also noted that a Rule 10 application was not the proper means of attacking a trial court's denial of a recusal motion. *Id.*, slip op. at 2 n.1. On October 15, 2021, the Tennessee Supreme Court denied Petitioner permission to appeal in the Rule 10 application.

Petitioner filed a second post-conviction recusal motion on October 20, 2021. In the motion, Petitioner asserted the post-conviction judge would be "a material witness" in the evidentiary hearing, with the judge's testimony being "important in [Petitioner's] establishing his [ineffective assistance of counsel claim] in the pending evidentiary hearing." Because the judge would be a material witness, Petitioner asserted the judge had a "personal interest [that] would prevent him from remaining impartial in his decision making." Petitioner also restated his assertions from the first recusal motion and argued that the post-conviction court was prejudiced against him for "refusing to provide" Petitioner the right to appear pro se and failing to provide Petitioner with transcripts from the preliminary post-conviction proceedings. At this point, Petitioner was still housed in New Mexico, although Petitioner's advisory counsel appeared at all hearings on Petitioner's behalf.

On November 19, 2021, the post-conviction court filed a written order denying the second recusal motion. In the order, the post-conviction court concluded that issues from the May 2016 transfer hearing were previously determined in the order denying the first recusal motion and by the Board of Judicial Conduct.[9] The post-conviction court stated that "a blanket assertion that the judge 'is a witness' will not support a motion for recusal." The post-conviction court rejected Petitioner's assertion that the court was denying Petitioner the right to appear, but the court did state that "Petitioner is acting as his own attorney, and as such should be present at the hearing[s]" in the case.

Petitioner attempted to file an application for permission to appeal from the recusal order, but this court dismissed the application as untimely. *White v. State*, No. W2021-01473-CCA-T10B-CO (Tenn. Crim. App. Dec. 20, 2021) (order dismissing application for permission to appeal), *perm. app. denied* (Tenn. Jan. 11, 2022).

On March 31, 2021, Petitioner filed a pro se amended petition. The post-conviction court held an evidentiary hearing on July 5, 7, 8, and 11, 2022. Petitioner, who was transported to Shelby County for the hearing, represented himself at the hearing, and advisory counsel also attended.

[9] In his Rule 10B application to this court following the post-conviction court's denial of the second recusal motion, Petitioner attached a copy of what purports to be a Board of Judicial Conduct complaint, dated April 20, 2021, addressing the pretrial colloquy between the trial court and Prosecutor. No order addressing the complaint appears in the record, but if a complaint was filed, it apparently was dismissed before the post-conviction court's November 2021 order denying the recusal motion.

At the post-conviction hearing, Montez Mullins testified that he went to the police in 2016 and told them "everything that [he] needed to tell them. [He] told them it was [his] package." Mr. Mullins also testified that he did not know why Petitioner was charged in the case because Mr. Mullins claimed that neither Petitioner nor Ms. Cole knew what was going on.

Mr. Mullins also testified that he spoke to Petitioner's trial counsel ("Counsel") before his own indictment. Mr. Mullins told Counsel he would testify at Petitioner's trial, but after Mr. Mullins was indicted, his attorney—and, he claimed, his co-defendants' attorneys—advised him against testifying at Petitioner's trial.

Mr. Mullins testified that in his statement to police, he said that he received text messages from Ms. Cole. But at the post-conviction hearing he denied knowing "beyond a reasonable doubt" that Ms. Cole sent the messages; Mr. Mullins could only say that his phone received messages from Ms. Cole's phone. Mr. Mullins also denied giving Ms. Cole tracking numbers for the package, and he denied knowing where Ms. Cole lived at the time of the offense, stating, "I know the address, but I ain't never been there." Mr. Mullins acknowledged making these denials in a statement given to police before his arrest, but could not recall whether the statement was introduced at trial.

Pretrial Counsel testified that he believed he represented Petitioner at his arraignment but that he did not remember Petitioner's arraignment specifically. He believed Petitioner's case was assigned to another attorney in his firm. Pretrial Counsel stated that his usual practice at arraignment was to enter a not guilty plea, waive formal reading of the indictment, and then have a brief conversation with the defendant. Pretrial Counsel stated "[W]e probably arraign thousands of people a year in our office." Pretrial Counsel testified that it was "not unusual, at all, that charges are upgraded. It may be that more information becomes available to the State, or the investigative agency. Often times people are re-indicted, are charged with higher offenses." Such occurrences were "not an everyday thing," Pretrial Counsel added, "but it certainly has occurred in the past." After reviewing the indictments and transcript from Petitioner's arraignment, Pretrial Counsel testified that Petitioner's indictments were "correct" and that the trial court properly informed Petitioner of the charges he was facing at the time. Pretrial Counsel stated that he did not know about the ex parte conversation between Prosecutor and the court because it occurred two weeks before the arraignment.

Counsel testified he had been practicing law for twenty-two years as of the post-conviction hearing. Petitioner's mother hired Counsel on September 23, 2016. Counsel acknowledged that the seventeen pretrial motions he filed were "boilerplate, or standard motions" he filed in most of his cases, but he denied that the motions were irrelevant to Petitioner's case. Counsel stated that the State complied with most of the motions, and if he believed a motion had required a hearing, he would have moved for a hearing. Counsel could not recall any other motions that he believed he should have filed before trial.

In his questioning of Counsel, Petitioner contended that Ms. Cole's arrest ticket, later introduced into evidence, suggested that Ms. Cole was arrested at 3:30 p.m., which would have been before the first two texts were sent from Ms. Cole's phone at 3:38 and 3:39 p.m. When asked whether knowledge of this discrepancy would have led Counsel to "challenge[] Detective Gaia's testimony about the other two alleged text messages that [were] sent from Ms. Cole's phone," Counsel replied:

> Well it potentially could have if the time which you are referring to was actually the booking time. The document that you are getting that from obviously we had, pretrial, that was her arrest record and that is her time of arrest. I am not sure that is her time of booking. And she got arrested around 3:30.
>
> Now, it also comes down to whether or not Officer Gaia was even correct in writing that time down. And so, again, without hearing his testimony how he chose to put that time down, I don't know.
>
> But, within the way the system works, the police officers when they write up an arrest ticket, they write up and they put in the time of the arrest.
>
> They literally, if it was on the street, they will call back in to dispatch to ask them for times. What time did I get dispatched, what time did I arrive on the scene, what time did we get the person into custody. And they will write those times on the records.
>
> From there, then they conduct their investigation. Again, if this was at a road side stop it would be on the side of the road.
>
> In this case, specifically, it was at her house, while they had a search warrant, they were executing a search warrant, it took several hours.
>
> And then, they would have driven her to jail east where they would have then booked her in, processed her.
>
> But, the arrest ticket, that time is when I read it and when I took it at the time of trial and I still to this day believe this is the time that they executed the search warrant and arrested her.
>
> If that is, in fact, the time that she was booked and those records show that all three text were made after that, then I think that is significant and that would have been something that we were not aware of.

Counsel stated that "what came out at trial" was that "the first two text messages were made by Ms. Cole and the third was made by Detective Gaia, but it was done while they were still on the scene executing the search warrant." Counsel testified that only Detective Gaia knew about the third message, so Counsel was "not sure that the State could turn that over." Counsel added that "if [Gaia] had never said a word we would have never known that, but it came out in the cross-examination in trial." When asked whether Detective Gaia's comment constituted *Brady* material, Counsel stated, "[I]t was important in [Petitioner's] trial, because it made him look like he was shady." In any event, because the detective had never written this statement down anywhere, "it was just straight from his memory[, and] I can't say there was anything to turn over." Counsel also testified that Petitioner did not have standing to contest a search of Ms. Cole's phone "since it was her property in her possession."

Counsel denied that Petitioner was arrested without a warrant or other probable cause. During Counsel's testimony, several documents from the trial record were introduced. The original indictment (naming Petitioner and Ms. Cole as co-defendants) and superseding indictment (adding Mr. Mullins as a co-defendant) both charged the co-defendants with one count of conspiracy to sell more than 300 grams of methamphetamine within 1,000 feet of a school, and one count of conspiracy to deliver more than 300 grams of methamphetamine within 1,000 feet of a school. The indictments cited to Tennessee Code Annotated sections 39-12-103, 39-17-408, and 39-17-434. But a capias issued by the Shelby County Criminal Court Clerk's office after the original indictment, stated Petitioner had been indicted for conspiracy to promote the manufacture of methamphetamine and cited to Code section 39-17-433. The incorrect offenses were listed on the attorney-client contract signed by Counsel and Petitioner, the presentence report, and the judgment forms.[10]

When asked by Petitioner about these discrepancies, Counsel stated, "[T]he indictment is correct. The indictment is what charges you. . . . [A] capias' purpose is to bring you back into the jurisdiction for prosecution of the indictment. You weren't prosecuted by this [capias], you were prosecuted under the indictment." Counsel acknowledged that the incorrect charges or statutory references were listed in the criminal court clerk's records, the judgment forms, and the presentence report. Despite these inconsistencies, counsel insisted he "absolutely knew what the charge was" at the time of Petitioner's trial.

Counsel chose not to hire an investigator because the case was "a factually very simple case, with what I thought was merely nothing that needed, or was available to be

[10] This court notes that at trial, the trial court instructed the jury on the charges as they appeared in the indictment, and in returning its verdict, the jury foreperson announced the jury had found Petitioner guilty of the offenses as charged in the indictment.

investigated. Had there been things that needed to be investigated we would have done that."

Counsel testified that before trial, after Petitioner "made us aware that [Mr. Mullins] was going to say that he was fully responsible for" the offense, Counsel investigated Mr. Mullins and "determined that he would be a good witness." Counsel moved to make Mr. Mullins available as a witness, but after the State obtained a superseding indictment adding Mr. Mullins as a co-defendant, there was not much Counsel could do. Counsel thought Mr. Mullins's indictment "was terrible" for Petitioner because it meant Petitioner "couldn't call [Mr. Mullins] as a witness." Counsel explained that after being indicted, a co-defendant has constitutional protections and cannot be forced to testify. Counsel explained Mr. Mullins could not have been forced to testify even if Petitioner's trial had been severed from that of Mr. Mullins.

Counsel did not remember whether Petitioner expressed a desire for a new attorney, but Petitioner never, explicitly, fired counsel or hired a new attorney. Reading from an April 28, 2017 transcript, Counsel stated that he informed the trial court that Petitioner wanted him relieved as counsel. Counsel testified that he was "ethically obligated" to inform the trial court about Petitioner's desire to hire new counsel, but Counsel did not "have the authority to relieve myself in a criminal case[;] the [c]ourt has to relieve me and the [c]ourt didn't relieve me, but . . . [Petitioner] had the absolute right to hire substitute counsel."

Counsel testified that on the first day of trial, July 10, 2017, Petitioner got mad and "stiff[-]armed" him across the throat in addition to threatening him. Counsel informed the trial court of this "assault," but the trial court did not remove Counsel. Counsel explained that it is "very common within the business of criminal defense that clients will attempt to manipulate the system by threatening their attorney if and when they get close to trial, they get scared, they don't want to go to trial[.]" In response to Petitioner's questions about a potential conflict of interest, Counsel replied, "If there was a conflict of interest, unfortunately [Petitioner] created that conflict of interest, and under the Rules [of Professional Conduct] the [c]ourt has to relieve me of that situation. I wasn't relieved so therefore I had to continue forward with the trial." Counsel acknowledged his communication with Petitioner was "impaired," but Petitioner's behavior created that impairment. But by the end of the trial, Counsel explained, Petitioner and Counsel "were having communications just fine[.]" Counsel denied that the assault and other difficulties that arose during his representation of Petitioner affected his ability to prepare for trial or otherwise represent Petitioner.

Counsel did not object at trial to Detective Gaia's testimony linking a 615 area code phone number to Petitioner. Counsel testified that the detective "did have personal knowledge of that, he conducted an investigation, that was within the scope of his investigation as a police officer. He developed that as evidence in the case and that is what

he testified to." Counsel did not object to the detective using Ms. Cole's cell phone to send a text message because Counsel did not believe the message was sent illegally. Counsel also did not object to Mr. Mullins's statement at trial because there was "nothing objectionable to it." Nor did Counsel believe that the State's using Mr. Mullins's statement at trial "inflamed" the jury. In fact, Mr. Mullins's statement was exactly the testimony Counsel would have elicited had he been able to call Mr. Mullins as a witness. Counsel noted that Mr. Mullins's admitting responsibility for the methamphetamine sent to Ms. Cole was "pretty good evidence" for Petitioner.

Counsel did not remember whether he cross-examined one specific officer. Upon being informed by Petitioner that counsel did not cross-examine the officer, counsel noted, "there were two other attorneys and out of three of us there was no need . . . for all three of us to get up and ask the same question, three different ways." Counsel also said he wanted to avoid asking too many questions and then have a witness "drop a bomb shell on you that the State didn't know about . . . then all of a sudden you're stuttering in front of the jury and the jury knows you don't know your case. It is a bad look."

Deputy Darius Jones of the Shelby County Sheriff's Office testified about the incident between Petitioner and Counsel on the day of trial. Deputy Jones was standing on a side wall of the courtroom, near the door leading to the area "in [the] back" where inmates are held before entering the courtroom. The deputy recalled the door into the courtroom was not closed. Deputy Jones heard Counsel "yell out something to the effect of, 'Jason get your hands off of me.'" Deputy Jones immediately left the courtroom through the side door and saw Petitioner and Counsel "standing face to face." According to the deputy, Counsel stated that Petitioner had tried to choke him. Yet Deputy Jones saw "no evidence of a struggle. [Counsel's] tie was still straight, his neck wasn't red," and Petitioner was holding paperwork. Deputy Jones then reported the incident to his supervisor, who in turn reported the incident to the trial judge. Deputy Jones wrote a report on the incident the night after it happened and had no additional involvement with the incident until he received a subpoena to testify at the post-conviction hearing.

Upon reviewing his report at the post-conviction hearing, Deputy Jones acknowledged that after speaking to Petitioner, he (Jones) wrote that Petitioner and his family were "seeking legal action against [Counsel]."

Petitioner's mother, Kimberly White, testified that she told Counsel that Detective Gaia would give false testimony, but Counsel told her "that it did not matter" if Detective Gaia would testify untruthfully because "the jury would believe the detective over anyone else." She also claimed that at one point Counsel threatened her, telling her that "if [she] did not keep [her] mouth shut . . . [she] would be arrested." Ms. White claimed she wrote the Board of Professional Responsibility ("BPR") "numerous times on [Counsel's] unethical behavior" toward her and Petitioner, but nothing came of her complaints.

Ms. White testified that Counsel "refused to talk to [Petitioner]. We had a conference conversation with [Counsel], and [Counsel] called [Petitioner] a [l]ittle [b]****." Ms. White claimed that one time Counsel "stated that he did not want the truth." Ms. White stated that the phone number 901-208-0105 never belonged to her, but it did belong to her husband, Michael Underwood.[11]

Ms. White also reached out to other attorneys when Petitioner and Counsel began experiencing friction, but she did not hire another attorney until after Petitioner's trial. Apparently, however, this attorney did little to no work on Petitioner's case and did not appear at Petitioner's hearing on the motion for a new trial.

Petitioner testified[12] that when he was brought to the Shelby County Criminal Justice Center after his indictment, he "wasn't sure what was going on" and had no attorney at the time. He recalled Pretrial Counsel was appointed "to assist me in the arraignment," but Petitioner claimed Pretrial Counsel refused to speak to him before the arraignment. Petitioner "thought" he initially hired another attorney to represent him, but that attorney "waited a month before he came to see me." Petitioner soon determined that attorney "didn't have an interest in trying to defend me," so his mother retained Counsel.

At first, Petitioner seemed pleased with Counsel's representation, given Counsel's jail visits and filing of seventeen pretrial motions. Petitioner was particularly happy with Counsel's work in getting Petitioner sent from the Shelby County Jail to TDOC custody. Still, Petitioner testified, Counsel soon began "making decisions that I wasn't understanding. . . . [A]nd then he was not telling me or advising me on what was going on with my case." Petitioner claimed he told Counsel about Mr. Mullins's willingness to testify on Petitioner's behalf, but Petitioner claimed Counsel acted slowly in speaking with Mr. Mullins, not bringing him to the Shelby County Jail until a scheduled trial date. At that trial date, the State sought a continuance; Petitioner testified that he was upset that Counsel did not "object to the fact that the prosecution was given more time to proceed with their case against me." Petitioner also testified that he asked Counsel why he did not object to Mr. Mullins's giving a statement to police, but Counsel "did not reply."

Petitioner claimed the next time he saw Mr. Mullins was at Mr. Mullins's arraignment. Petitioner said he "didn't understand when during the second indictment on the arraignment, how did [Counsel] stand up and be the one to introduce the new indictment against me . . . and to make my only witness a codefendant." According to Petitioner, Counsel replied that "this is just procedure . . . what has to be done." Petitioner asserted

[11] The phone number was not referenced in this court's direct appeal opinion, but at trial Detective Gaia testified that it was registered to Ms. White. It was also the number Ms. Cole called while in jail, presumably to reach Petitioner.

[12] Instead of having Petitioner ask himself questions, the post-conviction court permitted Petitioner to testify by undirected narrative.

that led him to inform Counsel that he (Petitioner) no longer wanted Counsel representing him.

Two weeks after Mr. Mullins's indictment, Counsel addressed the trial court, stating that Petitioner wanted to replace Counsel with a new attorney. Petitioner also told the trial court that he was seeking a new attorney, but Counsel told Petitioner in court that Petitioner "was going to have to get a lawyer and stay in the county until he came down here and signed on my jackets." After this court appearance, Petitioner, his family, and Counsel had a conference call during which, Petitioner claimed, Counsel told Petitioner "to quit acting like a little b****."

Petitioner introduced into evidence three letters he wrote to the BPR complaining about Counsel's representation. In the letters, Petitioner accused Counsel of "working with the D.A. against me" and becoming "an advocate for the prosecution" because Petitioner felt Counsel was responsible for the State's superseding indictment adding Mr. Mullins as a co-defendant. He also wrote to the BPR about Counsel's supposed failure to challenge the indictment because the charges listed in the indictment differed from those in the capias. Petitioner next wrote to the BPR about Counsel's supposed failure to "follow[] through with the motion to suppress" and other motions.

Petitioner also faulted Counsel for not trying to establish that the 901 area code phone number linked to Petitioner (through his mother) did not belong to Petitioner's mother. Petitioner acknowledged that this number belonged to his mother's husband at the time of the incident, and he also acknowledged his mother and her husband lived together at that time. Petitioner also faulted Counsel for not challenging Detective Gaia's testimony about the times at which certain text messages were placed from co-defendant Cole's phone. He also claimed to have told Counsel that the package of drugs was sent by UPS, not FedEx.

Petitioner testified that on July 10, 2017, he was brought to court for trial and told Counsel wanted to talk with him. Petitioner said, "I was already upset with [Counsel] because he wasn't doing anything for me and the fact that [Counsel] did call me a b**** over the telephone." Petitioner claimed that while he tried to keep his composure, Counsel told him to "shut up." This led Petitioner to tell Counsel "I'm just gonna have my family sue you." According to Petitioner, Counsel then yelled out, "Jason, get your f****** hands off of me." Petitioner claims Counsel then went into the courtroom and falsely accused Petitioner of assault. Petitioner also claimed that during trial, he told the trial court that Counsel was not advocating on Petitioner's behalf, but the trial court told Petitioner to take up his issues with Counsel. Petitioner recalled replying to the trial court, "I tried."

On September 15, 2022, the post-conviction court issued a written order denying Petitioner post-conviction relief. The post-conviction court concluded Counsel was not ineffective for "allowing" the State to indict Mr. Mullins because "[t]he decision to indict

co-defendant Mullins was not something that [Counsel] could have prevented." The post-conviction court also rejected Petitioner's assertions that Counsel was ineffective for not challenging the indictment based on the differing statutory notations and charges between the indictment and other documents in the record (such as the capias and the judgment forms) because such errors were clerical errors, and the indictment listed the proper statutes and charges for which Petitioner was prosecuted. The post-conviction court noted that Petitioner's issues concerning "[C]ounsel's admission" of co-defendant Mullins's statement and failure to sever Petitioner's case from the co-defendants' cases were resolved in the State's favor on direct appeal. Finally, the post-conviction court concluded Counsel was not ineffective for preventing the State from adding Mr. Mullins as a co-defendant or otherwise failing to call Mr. Mullins to testify on Petitioner's behalf at trial, with the post-conviction court noting that "if Mullins had testified, the [S]tate could have cross-examined him about many things" which could have damaged Petitioner's case at trial. These things included "[Mr. Mullins's] record, the texts [between] Petitioner and co-defendant Cole, the appearance of Petitioner's brother at the home of co-defendant Cole shortly after the package arrived[,] and more."

Petitioner subsequently timely appealed the post-conviction court's ruling.

ANALYSIS

To obtain post-conviction relief, a petitioner must establish his or her "conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of the United States or Tennessee Constitution." Tenn. Code Ann. § 40-30-103. A petitioner bears the burden of proving the factual allegations contained in the petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); *see Dellinger v. State*, 279 S.W.3d 282, 296 (Tenn. 2009). "Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998) (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)).

Appellate courts do not reassess the post-conviction court's determination of the credibility of witnesses. *Dellinger*, 279 S.W.3d at 292 (citing *R.D.S. v. State*, 245 S.W.3d 356, 362 (Tenn. 2008)). Assessing the credibility of witnesses is a matter entrusted to the post-conviction judge as the trier of fact. *R.D.S.*, 245 S.W.3d at 362 (quoting *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). On appeal, a post-conviction court's factual findings will not be disturbed unless the evidence contained in the record preponderates against the findings. *Brooks v. State*, 756 S.W.2d 288, 289 (Tenn. Crim. App. 1988); *Clenny v. State*, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978). On the other hand, conclusions of law are given no presumption of correctness on appeal. *Dellinger*, 279 S.W.3d at 293; *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

We review "a post-conviction court's conclusion of law, decisions involving mixed questions of law and fact, and its application of law to its factual findings de novo without a presumption of correctness." *Whitehead v. State*, 402 S.W.3d 615, 621 (Tenn. 2013) (citing *State v. Felts*, 354 S.W.3d 266, 276 (Tenn. 2011); *Calvert v. State*, 342 S.W.3d 477, 485 (Tenn. 2011)). Even so, the post-conviction court's underlying findings of fact may not be disturbed unless the evidence preponderates against them. *Dellinger*, 279 S.W.3d at 294 (Tenn. 2009) (citing Tenn. R. App. P. 13(d); *Vaughn v. State*, 202 S.W.3d 106, 115 (Tenn. 2006)). As a result, the appellate court is "not free to re-weigh or reevaluate the evidence, nor [is it] free to substitute [its] own inferences for those drawn by the post-conviction court." *Whitehead*, 402 S.W.3d at 621 (citing *State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001)).

I. Post-Conviction Court's Denial of Recusal Motions

Petitioner argues that the post-conviction court abused its discretion by failing to recuse itself because the post-conviction court was biased against him. Petitioner points to the ex parte conversation, detailed above, between the trial court and the State. Petitioner contends the ex parte hearing was improper per se and also exposed the trial court—who later presided over the post-conviction proceedings—to extrajudicial information that rendered the court prejudiced against Petitioner. Accordingly, Petitioner asserts he had the right to have his post-conviction case heard by a different judge than the one who presided over his trial, and he argues the trial judge was "an important witness to establish how this ex-parte hearing affect[ed] [Petitioner's] right to have his trial heard before a[n] unbiased decision maker and his [a]ttorney failed to challenge pre-trial." The State argues that the post-conviction court properly denied the motions to recuse because the brief pretrial colloquy between Prosecutor and the judge did not show the judge was prejudiced against Petitioner, nor did the post-conviction court's rulings against Petitioner exhibit prejudice. We agree with the State.

"Tennessee litigants are entitled to have cases resolved by fair and impartial judges." *Cook v. State*, 606 S.W.3d 247, 253 (Tenn. 2020). Article VI, section 11 of the Tennessee Constitution provides that "[n]o Judge of the Supreme or Inferior Courts shall preside on the trial of any cause in the event of which he may be interested." Tennessee's statutes[13] and the Code of Judicial Conduct provide similar rules. A motion to recuse should be granted if the judge has any doubt as to his ability to preside impartially in the case. *State v. Hines*, 919 S.W.2d 573, 578 (Tenn. 1995); *see also* Tenn. Sup. Ct. R. 10, Canon 2, R. 2.11(A). Even so, because perception is also important, recusal is also appropriate "when a person of ordinary prudence in the judge's position, knowing all the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." *Alley v.*

[13] "No judge or chancellor shall be competent, except by consent of all parties, to sit in the following cases: (1) Where the judge or chancellor is interested in the event of any cause." Tenn. Code Ann. § 17-2-101.

State, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994); *see also Smith v. State*, 357 S.W.3d 322, 341 (Tenn. 2011); Tenn. Sup. Ct. R. 10, RJC 2.11(A). "Hence, the test is ultimately an objective one since the appearance of bias is as injurious to the integrity of the judicial system as actual bias." *Davis v. Liberty Mut. Ins.*, 38 S.W.3d 560, 565 (Tenn. 2001); *see also Alley*, 882 S.W.2d at 822-23.

"A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter." Tenn. Sup. Ct. R. 10, RJC 2.9(A). Except, "[w]hen circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided" that the judge reasonably believes no party will gain an advantage from it and the judge makes "provision promptly" to notify all the parties of the ex parte communication, and lets them respond. *Id.* RJC 2.9(A)(1)(a)-(b).

As for the trial court's exposure to extrajudicial facts, the Tennessee Supreme Court has concluded that "'[p]rior knowledge of facts about the case is not sufficient in and of itself to require disqualification.'" *State v. Reid*, 213 S.W.3d 792, 815 (Tenn. 2006) (quoting *Alley*, 882 S.W.2d at 822). "Moreover, comments reflecting 'insensitivity and lack of sympathy on the part of the judge' are insufficient to establish impartiality unless they are pervasive and accompanied by prejudicial conduct." *Id.* at 816 (quoting *Alley*, 882 S.W.2d at 822). "Any comments made by the trial court must be construed in the context of all the facts and circumstances to determine whether a reasonable person would construe those remarks as indicating partiality on the merits of the case." *Alley*, 882 S.W.2d at 822.

Here, the ex parte hearing at issue was a brief colloquy where Prosecutor asked the trial court to sign a transport order so Petitioner could be present at his arraignment. This court concurs with the post-conviction court's conclusion that the interaction between the State and the trial court without Petitioner or a defense attorney present was the "type of communication [that] is specifically allowed for purposes of 'scheduling, administrative, or emergency purposes' and ultimately concerned allegations that were to be (and were) determined by the trier of fact which was a jury in this case." Indeed, the Tennessee Rules of Judicial Conduct state that "ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted[.]" Tenn. Sup. Ct. R. 10, RJC 2.9(A)(1). Further, a defendant has the right to be present from the empaneling of the jury until the discharge of the jury after a verdict has been rendered. *See Cook*, 606 S.W.3d at 253-54. The conversation regarding a transport order so that Petitioner could be present for his arraignment did not require Petitioner's presence because his right to be present had not yet attached, and therefore, the discussion did not violate the Rules of Professional Conduct.

As for the discussion of Petitioner's criminal record and the facts of this case, this court acknowledges such discussion was not entirely appropriate because it was irrelevant to the issue under review at the time—Petitioner's transfer from TDOC custody to the Shelby County Jail to be arraigned. In any event, the trial court's comments at the transfer hearing and his exposure to information about Petitioner did not, standing alone, prejudice the trial court against Petitioner. Regardless of the tenor of the discussion at the transfer hearing or the information the trial court may have gleaned during the hearing, the totality of the trial court's interaction with Petitioner and his advisory counsel during the post-conviction proceedings shows that the post-conviction court was not prejudiced against Petitioner. The post-conviction court may have made several adverse rulings against Petitioner both during trial and on post-conviction, but "adverse ruling[s] do[] not necessarily indicate [a court's] bias or prejudice" against a litigant. *Reid*, 213 S.W.3d at 816 (citing *Alley*, 882 S.W.2d at 821). Furthermore, as explored elsewhere in this opinion, the post-conviction court did not deny Petitioner the right to a full and fair hearing.

Finally, Petitioner asserts the post-conviction court was prejudiced against him because the court directed the State to quash subpoenas. We disagree. The only subpoena the post-conviction court instructed the State to quash was Petitioner's subpoena upon the post-conviction court. In its order denying Petitioner's second recusal motion, the post-conviction court stated it would "request the office of the Attorney General to file a Motion to Quash that subpoena." Notably, this request was not made to the District Attorney General defending against the post-conviction action. As stated elsewhere in this opinion, the trial court's refusal to testify in the post-conviction matter did not deny Petitioner a full and fair hearing, so the quashing of that subpoena did not prejudice Petitioner.

Nothing in the record shows that the court directed the State to quash Petitioner's other subpoenas. At a status conference, advisory counsel informed the post-conviction court that Petitioner was having trouble serving a subpoena. The post-conviction court responded that Petitioner could file subpoenas, but someone from the State needed to "come to Court and actually pay attention to it." The court also stated:

> The proper procedure is he can subpoena anybody he wants in the world. . . . It would be on the State then to file a motion to quash that subpoena or that individual through, you know, counsel to file it if they felt that it was honest . . . [I]t's not up to me to say that just out loud even though I can. It would be up to somebody to file a motion saying, you know, quash this. Then it would be up to [Petitioner] then to respond. If he can show a reason for it, then by all means he should be able to do so.

Also, the post-conviction court added that "somebody from the State" needed to attend "to discuss scheduling and a few of the other [issues]."

In sum, Petitioner has failed to establish that the ex parte transfer hearing—or anything else, for that matter—required the post-conviction court to recuse itself, so Petitioner is not entitled to relief on this issue.

II. Full and Fair Post-Conviction Proceeding

Petitioner also argues that the post-conviction court denied him a full and fair post-conviction proceeding on two grounds. First, Petitioner contends he was denied the right to be present as a pro se litigant. Second, he asserts the post-conviction court denied Petitioner the right to present relevant witnesses at his evidentiary hearing. The State disagrees with both arguments, claiming that Petitioner was provided advisory counsel to represent Petitioner at status hearings and that the post-conviction court allowed Petitioner to call five relevant witnesses during his three-day hearing. We agree with the State.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *see also Dotson v. State*, ___ S.W.3d ___, No. W2019-01059-SC-R11-PD, 2023 WL 4393296, at *11 (Tenn. July 7, 2023) (publication pending); *House v. State*, 911 S.W.2d 705, 711 (Tenn. 1995). "A full and fair hearing requires only 'the opportunity to present proof and argument on the petition for post-conviction relief.'" *Dotson*, 2023 WL 4393296, at *11 (quoting *House*, 911 S.W.2d at 711); *see also* Tenn. Code Ann. § 40-30-106(h) ("A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witness and otherwise present evidence, regardless of whether the petitioner actually introduced evidence . . . .").

A. Right to be Present

A petitioner has no inherent constitutional or statutory right to be present at all stages of a post-conviction hearing. *See Turner v. State*, 580 S.W.2d 797, 799 (Tenn. Crim. App. 1979). We did observe in *Turner*, however, that in "certain circumstances" holding post-conviction proceedings in a petitioner's absence "could run afoul of a convict's right to due process in the post-conviction setting." *Id.* Tennessee law requires the petitioner to "appear and give testimony at the evidentiary hearing if the petition raises substantial questions of fact as to events in which the petitioner participated[.]" Tenn. Code Ann. § 40-30-110(a). But neither that statute nor Tennessee Supreme Court Rule 28 compel attendance at all post-conviction hearings, and the statute does not require the petitioner's attendance if he is "incarcerated out of state, in which case the trial judge may permit the introduction of an affidavit or deposition of the petitioner and shall permit the state adequate time to file any affidavits or depositions in response the state may wish." *Id.*; *see also State ex rel. Barnes v. Rose*, 637 S.W.2d 459, 460 (Tenn. 1982) (reaching similar conclusion based on then-existing version of post-conviction statute regarding attendance).

As stated in this court's denial of Petitioner's Rule 10 application, most of the early post-conviction proceedings addressed procedural matters, and Petitioner's absence from these proceedings did not prejudice him—especially considering the presence of advisory counsel. Petitioner takes particular exception to an October 28, 2021 order filed by the post-conviction court revoking a previously-filed transfer order which would have had Petitioner brought to Shelby County on November 4, 2021 (a previously-scheduled date for the evidentiary hearing). However, the post-conviction court revoked the transfer order after Petitioner filed his October 2021 motion to recuse the post-conviction court. At that point, the post-conviction court was required to dispose of the recusal motion before conducting any business, including the post-conviction hearing. *See* Tenn. Sup. Ct. R. 10B, § 1.02 ("While the motion is pending, the judge whose disqualification is sought shall make no further orders and take no further action on the case, except for good cause stated in the order in which such action is taken."). The post-conviction court disposed of the motion without a hearing; Rule 10B does not require a hearing on a recusal motion. After the post-conviction court's November 19, 2021 order denying the recusal motion, the court entered another order transferring Petitioner from New Mexico to Shelby County for the evidentiary hearing.

In sum, Petitioner was present for the evidentiary hearing on the post-conviction motion, as the statute requires, and the post-conviction court did not otherwise deny him a full and fair hearing based on his absence from hearings on case status and other administrative matters when advisory counsel was present. Petitioner is not entitled to relief on this issue.

B. Denial of Witnesses

Petitioner argues that he was denied a full and fair hearing because he was not allowed to call several witnesses. This court will address each proposed witness individually.

First, Petitioner argues the post-conviction court improperly denied his request to call Prosecutor, whose testimony, Petitioner claims, would have "demonstrate[d] that there was [an] inappropriate relationship between the presiding Judge and [Prosecutor]." Petitioner also asserts Prosecutor's testimony was necessary to Petitioner's establishing the trial court's violation of Petitioner's right to conflict-free counsel and signing of documents that did not reflect the proper charges against Petitioner.

At the post-conviction hearing, Petitioner informed the court that he planned to call Prosecutor to testify. The State objected, arguing that Prosecutor could not add anything relevant to the ineffective assistance of counsel claims. Petitioner argued that Prosecutor's ex parte communications were "never addressed on direct appeal" and that his motions to recuse the post-conviction court only addressed the court's perceived bias—not whether Counsel should have challenged the communication. The post-conviction court allowed

the transcript to be entered into evidence, with the State acknowledging the transcript recounted the May 2016 transfer hearing. But the post-conviction court concluded that Petitioner had shown no reason for it to order Prosecutor to testify, noting that it had a responsibility to "monitor inappropriate subpoenas." The court also stated that "to the limited extent that you think it was ineffective assistance of your attorney, not have discovered this and taken some action, I think that you should be allowed to do it. I just don't think that [Prosecutor] is your vehicle."

Here, the post-conviction court properly sustained the State's objection to Petitioner's calling Prosecutor as a witness. As the post-conviction court stated at the hearing, the trial transcript established that the pretrial conversation took place. Petitioner argues that Prosecutor's testimony was necessary to establish that Counsel was ineffective for not challenging the pretrial colloquy, but the prosecutor's testimony would not have been relevant to that issue. Petitioner called Counsel as a witness and had the opportunity to ask Counsel why he did not challenge the pretrial colloquy, but Petitioner failed to do so. Accordingly, the trial court did not deny Petitioner a full and fair hearing by refusing to allow Petitioner to call Prosecutor as a witness.

Similarly, Petitioner argues the trial court judge (who, as previously stated, also presided over the post-conviction proceedings) was "materially important to establish the facts that [Prosecutor] was allowed to appear before him in an a[n] ex-parte [sic] hearing that violated [Petitioner's] rights to have the assistance of counsel." Petitioner also argues the trial judge's testimony was necessary to establish how the trial court denied Petitioner his right to conflict-free counsel and to establish that the prosecutor was "allowed to personally hand pick[] . . . the Judge to preside over a case." Accordingly, Petitioner argues the failure of the trial judge to testify denied him a full and fair hearing. We disagree.

As with the previous witness, this court observes that the transcript of the pretrial interaction between the trial judge and the prosecutor was introduced into evidence. The trial judge's testimony as to how or why this conversation occurred is irrelevant to the issues here. Petitioner also questioned Counsel about the trial court's denial of Counsel's motion to withdraw, so Petitioner was able to present relevant evidence on that issue. Finally, Petitioner did not argue in the court below that the State manipulated the assignment of cases to particular Shelby County Criminal Court judges, so this court will not address this claim here. To any extent such a claim could be related to Petitioner's general assertions that Prosecutor and the trial judge were prejudiced against him, those claims are not borne out by the record produced at trial or during the post-conviction proceedings.

For these reasons, we conclude the absence of the trial judge's testimony did not deny Petitioner a full and fair hearing.

Petitioner argues the trial court denied him a fair hearing by not ensuring that Detective Gaia was properly subpoenaed. Petitioner claims the detective's post-conviction testimony could have established that Counsel was ineffective for failing to investigate phone records which could have refuted the detective's trial testimony on the time of Ms. Cole's arrest (and could have established the detective sent more than one message from Ms. Cole's phone), and he also argues the records could have refuted the detective's testimony about a phone number linked to Petitioner's mother. We disagree.

Petitioner attempted to have Detective Gaia served with a subpoena before trial, but service failed. At the post-conviction hearing, the State asserted that it tried to serve him twice, apparently at his residence, but he was not served. At the hearing, a subpoena and return were introduced into the record; the return was marked "NOT TO BE FOUND." (emphasis in original). The officer attempting to serve Detective Gaia noted the following in the "Reason" section: "F/W answered door; refused to open glass door. Advised Mark Gaia is ex Bartlett officer now at FedEx, will not deal with this, closed door."

Although Detective Gaia did not testify during the post-conviction hearing, the records about which Petitioner would have had the detective testify were admitted as exhibits. During Petitioner's testimony, the post-conviction court admitted both phone records for Michael Underwood and an arrest ticket for Ms. Cole. Additionally, during Counsel's testimony, Petitioner asked Counsel about these records—particularly about the discrepancies in the times at which the texts from Ms. Cole's phone were sent and the potential time of her arrest—and the effect these records could have had on Counsel's representation.

In sum, Detective Gaia's absence from the post-conviction hearing did not deny Petitioner a full and fair hearing because the substance of what Petitioner hoped to obtain from his testimony was brought forth through other evidence. And as the post-conviction court stated during the evidentiary hearing, Petitioner could have had advisory counsel try to serve the former detective, but Petitioner failed to do so.[14] Petitioner is not entitled to relief on this issue.

Petitioner asserts he was denied a full and fair hearing because the trial court refused Petitioner to call as a witness Richard DeSaussure, the elected Shelby County Criminal Court Clerk at the time of Petitioner's trial. In his brief, Petitioner claims he wished to call Mr. DeSaussure to "establish that the charges were not [sic] entered into the system wrong," which in turn related to Petitioner's claim that Counsel was ineffective in failing to challenge the trial court's jurisdiction.

[14] In its order denying Petitioner relief, the post-conviction court observed that Detective Gaia testified at Ms. Cole's post-conviction hearing. Thus, Petitioner also could have sought admission of the detective's testimony from Ms. Cole's hearing in Petitioner's own case. This testimony has not been included in the record of Petitioner's appeal, so we will not further reference the testimony in this opinion.

At the post-conviction hearing, the post-conviction court stated:

> It doesn't matter how [the erroneous charges were entered], it just matters that it was a mistake. If it was a mistake and your attorney was [ineffective] for not catching it and doing something about it, then that is your argument. Not the, how could that have happened, it did happen.
>
> The State has agreed, [Counsel] has testified, the documents speak for themselves, they have the wrong statute number on them. We have established that as a fact.

We agree with the post-conviction court's assessment of the former clerk's proposed testimony. The capias, presentence report, and judgments reflecting charged offenses different from those listed in the original and superseding indictments were all entered into the record, and Petitioner questioned Counsel about these discrepancies. A potential explanation of how these discrepancies occurred was irrelevant to the jurisdiction issue raised by Petitioner. As explained later in this opinion, the jurisdiction issue does not entitle Petitioner to relief. For these reasons, we conclude the absence of the former clerk's testimony did not deny Petitioner a full and fair hearing.

III. Ineffective Assistance of Counsel

Petitioner argues that Counsel was ineffective in failing to: (1) prepare a strategy-based defense; (2) withdraw due to a conflict of interest; (3) investigate documentary evidence; (4) object to inadmissible evidence at trial; (5) challenge the court's jurisdiction to convict; and (6) file a pretrial motion to disqualify the trial judge.

Both the United States Constitution and the Constitution of the State of Tennessee guarantee criminal defendants the right to effective assistance of counsel. U.S. Const. amend VI; Tenn. Const. art. I, § 9. Under the Sixth Amendment to the United States Constitution, when a petitioner raises an ineffective assistance of counsel claim, the burden is on the petitioner to show both (1) counsel's performance was deficient and (2) the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see Lockart v. Fretwell*, 506 U.S. 364, 368-72 (1993). The *Strickland* standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. *State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). To prevail on such a claim, a petitioner must prove both prongs of the *Strickland* test, and failure to prove either is "a sufficient basis to deny relief on the claim." *See Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997). "[A] court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component." *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996).

An ineffective assistance of counsel claim presents a mixed question of law and fact. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). As a mixed question of law and fact,

this court's review of a petitioner's ineffective assistance of counsel's claims is de novo with no presumption of correctness. *Felts*, 354 S.W.3d at 276 (citations omitted).

To prove that counsel's performance was deficient, a petitioner must establish that his attorney's conduct fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. As our supreme court held:

> "[T]he assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence . . . . Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations."

Finch v. State, 226 S.W.3d 307, 315-16 (Tenn. 2007) (quoting *Baxter v. Rose*, 523 S.W.2d 930, 934-35 (Tenn. 1975)). A reviewing "court may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation." *Alley v. State*, 958 S.W.2d 138, 149 (Tenn. Crim. App. 1997) (citing *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). A reviewing court cannot criticize a sound, but unsuccessful, tactical decision made during the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994).

To prove prejudice, a petitioner must demonstrate "a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability means a probability sufficient to undermine confidence in the outcome." *Id.* As such, a petitioner must establish that his or her attorney's deficient performance was of such magnitude that he was deprived of a fair trial and that the reliability of the outcome was called into question. *Finch*, 226 S.W.3d at 316 (citing *Burns*, 6 S.W.3d at 463).

A. Failure to Prepare a Strategy-Based Defense

Petitioner argues that Counsel's failure to obtain Mr. Mullins's testimony at trial upended the original defense strategy (claiming Mr. Mullins was solely responsible for this offense) and left Petitioner without "any kind of tactical decision or trial strategy." The State argues that because Mr. Mullins's statement, which was exculpatory to Petitioner, was admitted at trial, Petitioner has not shown how Counsel was ineffective. We agree with the State.

Petitioner's argument that Counsel was ineffective for his failure to secure Mr. Mullins as a witness lacks merit. Counsel correctly testified that once the State indicted

Mr. Mullins as a co-defendant, Counsel could not have forced Mr. Mullins to testify. Indeed, the Fifth Amendment of the United States Constitution and article 1, section 9 of the Tennessee Constitution provide a privilege against self-incrimination. After the State indicted Mr. Mullins, his attorney advised him not to testify and he chose not to do so. Also, as Counsel testified at the post-conviction hearing, a defense attorney has no power to prevent the State from indicting someone, and the post-conviction court properly noted that the "decision to indict co-defendant Mullins was not something that trial counsel could have prevented."

Although Mr. Mullins's indictment precluded Counsel from calling him as a witness, Mr. Mullins's statement was still admitted at trial. On direct appeal, this court observed, "In the confession, Co-defendant Mullins stated that [Petitioner's] only involv[e]ment in the offenses was by introducing Co-defendant Mullins to Co-defendant Cole at some point in the past and when Co-defendant Mullins called [Petitioner] after he could not reach Co-defendant Cole." *White*, 2019 WL 549652, at *9. "Thus, the confession served to exculpate [Petitioner]." *Id.* When asked by the State whether this proof would "have been the testimony you would have hoped to have presented had [Mr. Mullins] been a witness for you at trial, versus a co-defendant," Counsel replied, "Yes, and that is why we had him on the transport order to come down and testify."

Petitioner has failed to show that Counsel was deficient in failing to prepare a strategy-based defense. Also, he has failed to show prejudice, because Mr. Mullins's statement was introduced anyway. Thus, we conclude Counsel did not render ineffective assistance as to this issue.

B. Failure to Withdraw

Petitioner also argues that Counsel was ineffective because he failed to withdraw due to what Petitioner contends was a conflict of interest. Petitioner alleges that Counsel was "representing the State's interest as well as [Mr.] Mullins."[15] We disagree.

Petitioner argues that Counsel "introduced" the superseding indictment (which added Mr. Mullins as a co-defendant) based on this statement by Counsel's to the trial court: "I believe the State has submitted to the grand jury a new indictment. It was just an arraignment on the superseding indictment, which was a re-indictment, enter a plea of not guilty." This is a nonsensical argument. Counsel's comment to the trial court was merely a statement of fact. The State sought, and obtained, the superseding indictment—not Counsel, who wanted Mr. Mullins to testify on Petitioner's behalf. Had Counsel not mentioned the superseding indictment during the pretrial status hearing, the trial court

[15] Petitioner raised a conflict of interest issue on direct appeal, but that issue was related to the trial court's refusal to discharge Counsel after the purported physical altercation between Counsel and Petitioner. We found this issue to be without merit. *See White*, 2019 WL 549652, at *4-6.

undoubtedly would have learned about the indictment through other sources. Thus, Counsel did not "introduce the new indictment" or otherwise represent the State's interest.

As to Mr. Mullins, Petitioner argues that Counsel's failure to object to the State indicting him as a co-defendant and failure to move to sever Petitioner's case from the co-defendants' cases shows that Counsel had a conflict of interest. Yet as discussed above, Counsel had no legal grounds to object to the State indicting Mr. Mullins as a co-defendant. Additionally, on direct appeal, Petitioner argued the trial court erred in not severing his case from those of his co-defendants. Under a plain error standard of review, we concluded that Petitioner did not establish "that he was 'clearly prejudiced' by his joint trial." *Id.* at *14. Even if the joint trial allowed the State to admit Mr. Mullins's statement, this court concluded on direct appeal that the Mullins statement was exculpatory for Petitioner. *Id.* at *9.

In our view, Counsel did not represent Petitioner under a conflict of interest, so his failure to move to withdraw on the grounds listed here did not constitute deficient performance. Nor has Petitioner shown that Counsel's actions prejudiced Petitioner. We therefore conclude Counsel did not render ineffective assistance as to this issue.

C. Failure to Investigate

Petitioner next argues that Counsel was ineffective because he failed to: (1) investigate or follow-up on Detective Gaia's testimony on which company shipped the drugs; (2) investigate Detective Gaia sending text messages to Ms. Cole; (3) follow up on the cell phone listed to Michael Underwood; and (4) hire a defense investigator. This court disagrees.

Throughout these post-conviction proceedings, Petitioner has asserted the package of drugs received by Ms. Cole was shipped by UPS, contrary to Detective Gaia's trial testimony, in which he said that the drugs were sent by FedEx. The State argues, "[t]his is a distinction without a difference," and this court agrees that the identity of the shipping entity is not a material distinction. All the same, drugs were sent to Ms. Cole. Petitioner had the opportunity to ask Counsel whether he knew about this supposed discrepancy and, if he had, how he would have presented Petitioner's case differently, but Petitioner did not do so. Accordingly, Petitioner has not shown how Counsel's purported failure to investigate the identity of the shipping company constituted deficient performance, nor has Petitioner shown that counsel's actions prejudiced Petitioner. Counsel did not render ineffective assistance as to this issue.

Petitioner also argues that Counsel failed to investigate further into the times of Ms. Cole's arrest, the execution of the search warrant, and the sending of the text messages. Petitioner asserts Counsel should have used such evidence to impeach Detective Gaia's testimony, in which the detective admitted sending only one text message from Ms. Cole's

phone. The documentary evidence, Petitioner asserts, would have established that Ms. Cole was arrested before the three texts from her phone were sent, meaning that Detective Gaia sent all three messages.

Conceivably, Counsel could have compared the times listed for the text messages to the times listed on the arrest ticket and search warrant and used this information to cross-examine Detective Gaia. At any rate, as Counsel acknowledged during his testimony, Detective Gaia was impeached on cross-examination by admitting he sent the third message from Ms. Cole's phone—a fact the detective omitted on direct examination. Counsel even testified the detective's acts made him look "shady."

Given this evidence, it is unclear from the record exactly how an investigation into the records of Ms. Cole's arrest and the times at which the texts were sent and the search warrant executed would have affected the outcome of Petitioner's trial. Petitioner makes no argument on how such an investigation would have resulted in a different outcome at trial, and the weight of the other evidence presented at trial suggests the results of a potential investigation by Counsel would not have affected the jury's verdict even if the investigation showed Detective Gaia sent one or both of the other texts. Without a showing of prejudice, this court concludes Counsel did not render ineffective assistance as to this issue.

Petitioner also argues that Counsel should have investigated the cell phone listed to Michael Underwood at 901-208-9195. Although not exactly clear in his brief, Petitioner apparently argues that had Counsel discovered this evidence, he could have used it to impeach Detective Gaia's testimony. However, Petitioner did not ask Counsel about Michael Underwood's purported phone during the post-conviction hearing, so Petitioner failed to establish whether Counsel knew about this discrepancy or found it worth bringing to the jury's attention. At the post-conviction hearing Ms. White testified Mr. Underwood was her husband at the time of the offense, and Petitioner testified his mother was living with her husband at the time. Just as the jury could have inferred, Ms. Cole contacted Ms. White's phone to reach Petitioner, so too could the jury have inferred that Ms. Cole contacted the phone registered to Ms. White's husband to contact Petitioner. Considering these facts, Petitioner cannot establish that Counsel's failure to challenge Detective Gaia's testimony about the owner of this phone number prejudiced Petitioner. Counsel, therefore, did not render ineffective as to this issue.

Petitioner makes a generalized claim that Counsel's failure to investigate—and, presumably, Counsel's failure to hire an investigator—constituted ineffective assistance because Counsel's failings left him unable to challenge Detective Gaia's testimony. Still, this court has concluded that none of Counsel's supposed failures to refute Detective Gaia's testimony entitle Petitioner to relief, and as the State mentions in its brief, Petitioner "has failed to show what exculpatory information trial counsel would have found had he hired

an investigator." To any extent Counsel's declining to retain an investigator could be seen as deficient performance, Petitioner has failed to establish Counsel's investigation prejudiced Petitioner at trial. Thus, Petitioner has failed to establish Counsel rendered ineffective assistance as to this issue.

D. Failure to Object to Inadmissible Evidence at Trial

Petitioner argues that Counsel was ineffective because he failed to object to or move to suppress Ms. Cole's cellular phone data at trial. We disagree.

At the post-conviction hearing Counsel testified that Petitioner would have lacked standing to the challenge a search of Ms. Cole's phone because the phone did not belong to Petitioner. Counsel's assessment of the law is correct. This court has determined that a person lacks standing to challenge the constitutionality of a search of a co-defendant's phone. *See Wells v. State*, No. E2020-01278-CCA-R3-PC, 2021 WL 5811248, at * 13 (Tenn. Crim. App. Dec. 7, 2021), *perm. app. denied* (Tenn. Mar. 23, 2022); *State v. Hawthorne*, No. E2015-01635-CCA-R3-CD, 2016 WL 4708410, at *25-26 (Tenn. Crim App. Sept. 7, 2016) (concluding that an appellant "did not have standing to challenge the searches" of other persons' phone data "because he had no reasonable expectation of privacy in another person's cell phone data and records"). Accordingly, we have concluded that an attorney does not render ineffective assistance by not challenging the admissibility of another person's cell phone records or data. *Wells*, 2021 WL 5811248, at *13; *Blunkall v. State*, No. M2017-01038-CCA-R3-PC, 2019 WL 104136, at *26 (Tenn. Crim. App. Jan. 4, 2019).

Even if Petitioner somehow had standing to challenge the admissibility of evidence related to Ms. Cole's phones, Counsel's failure to do so did not prejudice Petitioner. On direct appeal, Petitioner challenged the admission of Ms. Cole's cellular phone data. Because Petitioner did not challenge the admission of the data before or during trial, this court treated the issue as waived and reviewed the issue solely for plain error:

> We conclude that [Petitioner] has not established that "a clear and unequivocal rule of law [was] breached" by the admission of the text messages and by Detective Gaia's testimony regarding the messages. *See* [*State v.*] *Adkisson*, 899 S.W.2d [626,] 641 [(Tenn. Crim. App. 1994)]. The text messages were clearly relevant to the State's theory of the case. The messages made it more likely than not that at least two people conspired to possess the package of methamphetamine with the intent to sell it or deliver it to another person. The introduction of the text messages did not breach Tennessee Rule of Evidence 403 because the probative value of the messages was not substantially outweighed by any unfair prejudice to [Petitioner]. The majority of the messages were not sent to a contact in Co-defendant Cole's phone listed as [Petitioner]—the jury had to infer that Co-defendant Cole

> listed [Petitioner] as "BooBear" and similar references in her phone. Additionally, the probative value of the messages was not substantially outweighed by "needless presentation of cumulative evidence" because Co-Defendant Cole used different contact names for [Petitioner] in the three phones and [Petitioner] used different signatures in his text messages. Thus, [Petitioner] is not entitled to plain error relief on this ground.

White, 2019 WL 549652, at *10 (alterations added).

Counsel's refusal to raise an issue that would not have entitled Petitioner to relief did not constitute deficient performance. Nor did counsel's actions in this regard prejudice Petitioner. Thus, Counsel did not render ineffective assistance as to this issue.

E. Failure to Challenge Jurisdiction

Petitioner next argues that Counsel was ineffective for failing to challenge the trial court's jurisdiction to convict him. Petitioner believes that because of the error on the capias, there was no authority to arrest him. Petitioner argues that because he was originally indicted for an offense that was different than that for which he was ultimately convicted, the trial court lacked jurisdiction to convict him, and Counsel's failure to challenge this discrepancy prejudiced him. We disagree.

On direct appeal, Petitioner "assert[ed] that the indictment was invalid because he was originally indicted on the promotion of manufacturing methamphetamine . . . but a superseding indictment charged him with conspiracy to possess methamphetamine with the intent to sell or deliver within a drug-free zone." *White*, 2019 WL 549652, at *6. Petitioner therefore argued that "the indictment was improperly amended." *Id.* Counsel did not file a pretrial motion challenging this discrepancy, so this court treated the issue as waived. *Id.* at *7. In reviewing the issue for plain error, we noted that both the original and superseding indictment charged Petitioner with the same offenses—the offenses for which he was ultimately convicted. *Id.* at *8. We concluded that Petitioner was not entitled to plain error relief because in issuing the superseding indictment, the State did not alter the charges against Petitioner. *Id.*

Petitioner subsequently petitioned to rehear, arguing that based on the discrepancies between the capias (and other documents) and the indictments, his indictments "were amended or altered by the Shelby County District Attorney or Shelby County Courts." In denying the petition to rehear, this court did not address Petitioner's claims directly but determined the judgments contained a "clerical error" because "the judgments do not reflect the correct conviction offense for which the jury found [Petitioner] guilty." *State v. White*, No. W2018-00329-CCA-R3-CD, order at 1 (Tenn. Crim. App. Mar. 8, 2019) (denying petition to rehear). "We den[ied Petitioner's] petition to rehear because he did

not specifically allege in his appellate brief that the judgments contained a clerical error." *Id.*

At the post-conviction hearing, Counsel testified that the original and superseding incitement both charged Petitioner with conspiracy to commit possession of methamphetamine with intent to sell or deliver within 1,000 feet of a school, the "correct" charges—i.e., the charges for which Petitioner was tried and convicted. Pretrial counsel also testified that Petitioner was indicted for "what it says on the indictment." This court agrees with the attorneys' assessments. Furthermore, as the post-conviction court stated in its order denying the petition, "[h]ad this [discrepancy] been pointed out prior to trial, it would have simply been corrected as a clerical error. The body of the indictment is correct. Petitioner is incorrect in his assertion that clerical errors on un-related [sic] documents are jurisdictional."

Because the issue regarding the discrepancies between the capias and indictment would not have entitled Petitioner to relief, his attorneys were not deficient in failing to raise a meritless issue. Nor did the attorneys' actions in this regard prejudice Petitioner. Petitioner is not entitled to relief on this issue.

F. Failure to Move to Disqualify Trial Judge and Prosecutor

Petitioner argues that both Counsel and pretrial counsel were ineffective for failing to move to disqualify the trial judge for the aforementioned "ex parte" communication with Prosecutor. Petitioner also argues that both attorneys were ineffective for failing to move to disqualify Prosecutor for prosecutorial misconduct. We disagree.

As stated earlier in this opinion, the pretrial colloquy between the trial court and Prosecutor when discussing Petitioner's transfer into Shelby County custody was not improper and not prejudicial toward Petitioner. Nothing resulting from that hearing reflected any prejudice by the trial court toward Petitioner, and Petitioner did not have a constitutional or statutory right to be present at this conversation. As stated above, Petitioner had the opportunity to question Counsel about this exchange and whether it would have given rise to a motion to disqualify, but Petitioner did not question his trial attorney about these topics. For these reasons, we conclude Counsel's failure to move to recuse the trial judge was neither deficient performance nor prejudicial toward Petitioner. Counsel did not render ineffective assistance as to this issue.

Petitioner also argues that his attorneys should have moved to disqualify Prosecutor for prosecutorial misconduct, citing the same "ex parte" communication. However, the communication did not constitute "prosecutorial misconduct." The test for determining prosecutorial misconduct on appeal is whether it "has affected the verdict to the prejudice of defendant and consequently amounts to reversible error." *State v. Buck*, 670 S.W.2d 600, 609 (Tenn. 1984). As stated throughout this opinion, the pretrial conversation

between the prosecutor and trial court was not improper and did not prejudice Petitioner. Therefore, his attorneys were not ineffective in failing to move to disqualify Prosecutor.

VI. Cumulative Error

Finally, Petitioner argues that "[e]ven if any or all of the errors above were harmless on their own, the cumulative effect of the errors undermines confidence in the fairness of the proceedings." The cumulative error doctrine recognizes "that there may be multiple errors committed in trial proceedings, each of which in isolation constitutes mere harmless error, but which when aggregated, have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial." *State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010); *see also State v. Leath*, 461 S.W.3d 73, 116 (Tenn. Crim. App. 2013). Since we have not discerned any singular error on Petitioner's post-conviction appeal, there can be no cumulative error. Accordingly, Petitioner is not entitled to relief on this issue.

CONCLUSION

Based on the foregoing reasons, authorities, and the record, the judgment of the post-conviction court is affirmed. However, as this court noted above, the judgment forms reflect the incorrect conviction offenses; specifically, they list the conviction offenses as conspiracy to promote manufacture of methamphetamine. The court, therefore, remands this case to the Criminal Court for Shelby County for entry of corrected judgments which reflect the offenses for which Petitioner was actually convicted.

_____

MATTHEW J. WILSON, JUDGE